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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 811

DUKE LEE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1965. The petition for a writ of certiorari was filed on December 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the act of an undercover agent in going to petitioner's home, at petitioner's invitation, to consummate a sale of marihuana constituted an unlawful search and seizure.

STATEMENT

Petitioner, who waived a jury trial, was convicted in the United States District Court for the District of Massachusetts of two sales of marihuana and was given concurrent sentences of imprisonment for five years. The conviction was affirmed on appeal (Pet. 7-8).

The evidence showed that an undercover agent was given petitioner's name as a person who would sell him marihuana (R. 8). The agent, using an assumed name, telephoned petitioner and said that he had heard petitioner had "some pretty good grass" (R. 10, 50). Petitioner said he could take care of the matter and gave the agent his address and directions as to how to get there (R. 10). At petitioner's apartment, petitioner told the agent that, if the agent became a regular customer, he would give him six instead of five bags for $50 (R. 12). The agent paid petitioner $50 and was directed to a package on the porch wrapped in newspapers. The agent left, taking with him the package which contained five envelopes of marihuana (R. 12).

About two weeks later, the agent called and said he wanted to pick up six bags for $50 (R. 11). Petitioner again directed the agent to come over (R. 11).

At the apartment, the agent gave petitioner $50 for a package which contained six bags of marihuana (R. 13).

ARGUMENT

Petitioner's sole contention, raised in a motion to suppress before trial and subsequently renewed, is that the agent's entry into his apartment in an undercover capacity to purchase marihuana constituted an illegal search and seizure in violation of the Fourth Amendment. However, as the court below pointed out, the agent was in petitioner's apartment at petitioner's express invitation for the purpose of making a purchase. The fact that the agent did not reveal his undercover capacity does not amount to a violation of petitioner's right of privacy. See *Lopez* v. *United States*, 373 U.S. 427, 438 where this Court held that an agent was not guilty of an unlawful invasion of the defendant's office "simply because his apparent willingness to accept a bribe was not real."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
Attorney.

DECEMBER 1965

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Supreme Court of the United States.

OCTOBER TERM, 1965

No. 36

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION FOR THE UNITED STATES.

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REPLY

BRIEF

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PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION FOR THE UNITED STATES.

Argument.

I. The sole case relied upon by the respondent, *Lopez* v. *United States,* 373 U.S. 427, 438, not only fails to support the position of the respondent, *but is not in point.*

The present case deals with the right of a federal officer in disguise to enter the petitioner's home having previously initiated and procured his invitation by deception for the express purpose of soliciting a crime and obtaining evidence to be used against the petitioner, *all without the benefit of a search warrant* which he could have obtained and had ample time to do so (R. 7, 8).

In the *Lopez* case, *supra,* the federal agent was not in disguise and was rightfully on the premises in his official capacity as a revenue agent, all known to the owner (de-

fendant), who then initiated and attempted to bribe the officer (the crime for which he was convicted).

II. The respondent in its opposing brief (p. 2) clearly points out the *undisputed fact* that the federal officer in this case sought out the petitioner, originated and solicited his fraudulent invitation (without a search warrant) and, by this deceptive practice, gained entrance to the home of the petitioner for the purpose of obtaining evidence to be used against him and to solicit a crime—the very practice which was held unconstitutional in *Gouled* v. *United States,* 255 U.S. 298, and which has been updated by reference in the *Lopez* case, *supra.*

III. Finally, the fact that the respondent here and the Court of Appeals have both failed to support their positions and both have relied upon *different* cases, *neither* of which is in point, should be a strong indication that this question ought be answered. Furthermore, it appears to the petitioner that the question, which involves the constitutional right of every citizen to be secure in his home from such improper police practices, should be reviewed by the Supreme Court. Such practices are all too familiar in other forms of government, but are fatal to the most fundamental concepts of personal freedom as guaranteed by our democracy.

Respectfully submitted,

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